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IN THE

Supreme Court of the United States

No. 1307

JANUARY TERM, 1968

JULES HAIRSTYLISTS OF MARYLAND, INC.,
JULES HAIRSTYLISTS, INC., and
JULES HAIRSTYLISTS OF VIRGINIA, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA, and
IRVING MACHIZ

District Director of Internal Revenue of Maryland

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND SUPPORTING BRIEF AND APPENDIX

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The Petitioners, by Harry S. Shapiro and Paul B. Engel pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit dated January 12, 1968.

OPINIONS BELOW

The opinions of the courts below are presented in the Appendix herein. They represent the opinions of the United States District Court for the District of Maryland (Judge Edward S. Northrop) and the opinion dated January 12, 1968 of the United States Court of Appeals for the Fourth Circuit.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under 28 U.S. C. A. Section 1254.

QUESTION PRESENTED

Was the refusal by the lower Courts to grant the Petitioners a hearing on the merits of their case a denial of due process under the Constitution of the United States.

STATEMENT

The Amended Bill of Complaint alleged that under the Act of Congress effective January 1, 1966, and thereafter, the United States through its agent, the District Director for Internal Revenue for Maryland, attempted to make and constitute the Petitioners, as employers, the conduit or agent for the government with reference to the collection of income taxes and social security taxes due on the tip income of their employees. This tip income of the employees was admitted by the government to be self-employment income to the said employees in that the employer had no control over said tip income and consequently, no comparable social security tax was imposed upon such employer with reference to said tip income.

The net result of the aforesaid new law and the instructions and regulations issued thereunder was to place a

burden upon an employer, who was not the taxpayer, to account for such tips and recover the appropriate withholding and social security taxes on same when such tips were not within said employer's dominion or control. This burden imposed by the government upon such an employer was alleged to be severe and substantial in that it would create the necessity to sustain great expense and responsibility concerning the recording and reporting of the aforesaid withholding taxes and social security taxes. The application of this law would cause the Petitioners to keep two sets of records pertaining to the taxes in question along with the other burdens and responsibilities incident to same.

The Petitioners further alleged that the government was attempting to make the Petitioners a collection agency for the government without compensation, which action would constitute a confiscation of the property of the Petitioners without "due process of law".

As a result of the failure on the part of the Petitioners to comply with said new law, the Petitioners were faced with possible criminal and civil penalties and possible responsibilities for the taxes of their employees in view of the fact that some of their employees had tendered tax money pertaining to tip income. Necessarily, the Petitioners' position was and is one of extreme jeopardy in view of the aforegoing, and the Petitioners sought a declaration in the Federal Court testing the constitutionality of the Federal law in question and seeking to enjoin the District Director for Internal Revenue of Maryland from enforcing the law in question against the Petitioners.

After a Motion to Dismiss was filed, the Trial Court entered an Order dismissing the Amended Bill of Complaint of the Petitioners, and thereby refused to give the

Petitioners an opportunity to be heard on the merits of their case.

The United States Court of Appeals for the Fourth Circuit affirmed the Trial Court by a per curiam opinion.

REASONS FOR GRANTING WRIT

Various issues were presented in the lower Courts which related to the provisions for a three-judge Court under Title 28 Sections 2282 and 2284 of the United States Code in view of the fact that the proceedings involved a request for a permanent injunction restraining the enforcement, operation, or execution of an Act of Congress for repugnance to the Constitution of the United States.

In addition, Title 26 Section 7421 of the United States Code was involved in that the Petitioners were attempting to restrain the government from forcing the Petitioners to collect taxes on the tip income of their employees. The government alleged that this section of the law prevented the Petitioners from bringing the action in question.

Also, Title 28, Section 2201 of the United States Code was involved as it pertains to declaratory relief in controversies with respect to Federal taxes.

During the proceedings below, the government alleged that Section 7421 (a) of Title 26 of the United States Code as amended in 1966 prevented the Petitioners from bringing the action in question (notwithstanding the admissions of the government that the Petitioners were not "taxpayers") unless the Petitioners had been subjected to a levy on their property. It is important to note that the aforesaid 1966 amendment was adopted by the Congress after the institution of this proceeding.

This proceeding is most unique in that this is the first time in the history of the United States that the government has attempted to force a third party, who is not the taxpayer, to account for taxes on the self-employment income of an employee. This case is most unusual in that the government has admitted that it believes that the Petitioners have no recourse to attack this imposed burden in any forum, in any place. The government has stated that the Petitioners, not being taxpayers, would have no right to proceed through the tax court proceedings to attack the ability of the government under this new law; and that the Petitioners do not have the right to bring an action in any other court for such attack. It seems to me that this is a pure case of confiscation by the government and a pure case of a denial of due process under the Constitution of the United States.

It would certainly be a travesty of justice if the Petitioners had no avenue or right to be heard anywhere on the issues that they have raised in this proceeding notwithstanding the clear cut burden being imposed, or being attempted to be imposed, by the government.

The Petitioners have cited many cases in the Courts below where the Federal Court has taken jurisdiction in similar cases in order to prevent injustice and in order to apply equitable principles. Certainly, we believe that exceptional and extraordinary circumstances exist in this case, and that the issue presented here pertaining to the Petitioners right to be heard on the merits of their case is a real issue worthy of being explored by the Supreme Court of the United States.

If Section 7421 (a) of Title 26 of the United States Code (as amended after the institution of this proceeding) is applicable, then this is a further denial of due process in this case.

Although the power of government is admittedly great, there must be limitations in order to safeguard the protections of the Constitution. Although the government's right to collect taxes has been consistently upheld, the government has never attempted to use one citizen as its agent in order to collect taxes from another citizen when the taxes flow from self-employment income.

The following are some of the authorities that were presented in the Courts below in order to sustain the principle that jurisdiction should be invoked in this case in order to determine the validity of the statutes in question as they relate to the responsibility of a third party to account for the taxes of a taxpayer.

The Federal Court, sitting also as a Court of Equity, is charged with the responsibility of supplying a forum for a hearing on the merits where no other remedy is available. In controversies between the Government and third persons (not the taxpayer), the courts have recognized that no remedy exists in the tax court, and therefore, a line of cases has developed establishing an exception pertaining to contests between the Government and third persons, who are not the taxpayers. In some extreme cases, the Federal Court has assumed jurisdiction in tax cases where even the taxpayer was involved.

In a recent case decided on May 4, 1966 by the Fourth Circuit in the case of *Floyd vs. U. S.*, 361 F. 2nd 312, the Court dismissed the attempt to restrain the collection of taxes. The Court stated that the Plaintiff in said case could not prevail because it was not clear that the Government would ultimately fail to establish that the tax liability was also that of said Plaintiff. However, the Court further stated that a construction of Title 26, United States Code, Section 7421, was involved. After determining that the Court had no jurisdiction, the Court stated that where

no tax deficiency has been asserted against one whose property is seized, a suit against the Government for injunctive relief seems peculiarly appropriate for the aggrieved party, not being an alleged tax delinquent, would have no opportunity in the ordinary channels of tax litigation to contest the validity of the Government's assessment.

In the case of *New York Casualty Co. vs. Zwerner,* 58 F. Supp. 473, decided in 1944, the Court stated that a Third Party is entitled to an injunction against the Collector of Internal Revenue and declaratory relief may also be granted since the law barring relief in tax cases only applies to controversies involving the taxpayers in which validity and propriety of the tax itself is in controversy.

In the case of *Hoye vs. U. S.,* 109 F. Supp. 685, decided in 1953, the Court stated that Title 26 Section 7421 of The United States Code is applicable to suits by taxpayers, but not to suits by Third Persons and did not preclude suits by Third Persons for declaratory relief notwithstanding that the declaratory relief involved effected a determination of the tax liability in question.

In the case of *Tomlinson vs. Smith,* 128 F. 2nd 808, decided in 1942, the Court stated that Title 26, Section 7421 of the United States Code is applicable to a suit by the taxpayer but not applicable to a suit by a Third Person.

This same theory was established in the case of *Glenn vs. American Surety Co.,* 160 F. 2nd 977, decided in 1947.

In the case of *Holland vs. Nix,* 214 F. 2nd 317 decided in 1954, the Court stated that sub-section (b) Title 26, Section 7421 of the United States Code providing that an action should not be maintained for the purpose of restraining assessment or collection of taxes against a taxpayer, or his transferee, is general in its terms, and should not be construed as abrogating the equitable principles which

permit actions to restrain collection where the action is illegal and where there exists special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisdiction.

In the case of *Miller vs. Standard Nut Margarine Co. of Florida,* 52 S. Court 260, 284 U. S. 498, 76 L. Ed. 422, decided in 1932, the Supreme Court stated that where irreparable injury is involved even the taxpayer is entitled to an injunction against the United States.

This same theory was recited in the case of *Hirst and Co. vs. Gentesch,* 133 F. 2nd 247, decided in 1943.

In the case of *Sanders vs. Andrews,* 121 F. Supp. 584, the Court also found exceptional and extraordinary circumstances in order to assume jurisdiction in a contest by the taxpayer against the United States notwithstanding the fact that the particular taxpayer was the Plaintiff.

In the case of *Raffaele vs. Granger,* 196 F. 2nd 620, decided in 1952, the Court again recited the theory that Third Persons may proceed with injunctive relief proceedings against the United States notwithstanding the fact that the particular issue involved is taxes.

In the case of *Botta vs. Scanlon,* 288 F. 2nd 504, the Court assumed jurisdiction notwithstanding the fact that the contest presented involved the taxpayer himself.

This same theory was recited in *Lassoff vs. Gray,* 266 F. 2nd 745.

In the case of *Melvin Building Corp. vs. Long,* 262 F. 2nd 920, the Court stated that one of the essential elements in determining jurisdiction is the question whether or not the tax was illegal.

In the case at bar, we have alleged that the tax on tips, as it relates to the employer, who is not the taxpayer, is

illegal as it constitutes an imposed burden upon the employer without due process of law.

In the case of *Liquori vs. U. S.*, 246 F. Supp. 530, the Court assumed jurisdiction in a case involving a taxpayer who was attempting to enjoin assessment and a collection of taxes. The Court stated that the taxpayer would have no remedy at all unless the Court took jurisdiction.

In the case of *Sherwood vs. Scanlon*, 207 F. 2nd Supp. 686, the Court also took jurisdiction on the theory that special and extraordinary circumstances existed notwithstanding the fact that the Complainants attempted to enjoin the collection of taxes.

In the case of *Long vs. U. S.*, 148 F. Supp. 758, the Court said that the law prohibiting issuance of injunction to prevent collection of taxes is applicable where, coupled with apparent illegality of taxes imposed, extraordinary circumstances falling under the head of equitable jurisdiction are manifest.

In the case of *Sonitz vs. U. S.*, 221 F. Supp. 762, the Court stated that the suit against the United States to expunge liens and to restrain tax collections under the facts and circumstances in this case was not such suit for declaratory judgment with respect to Federal taxes, or for injunctive relief restraining collection of tax, or for tax refund as would be prohibited by law.

See also *Falik vs. U. S.*, 343 F. 2nd 38; *Bartell vs. Ridell*, 202 F. Supp. 70; *Singleton vs. Mathis*, 284 F. 2nd 616; *Birdsong vs. Davis*, 176 F. Supp. 134; *Williams vs. Wiseman*, 333 F. 2nd 810; *Vurin vs. Burton*, 327 F. 2nd 957; *Smith vs. Flinn*, 261 F. 2nd 781; *National Boundary Co. of New York vs. Director of Internal Revenue*, 229 F. 2nd 149; *Stone vs. Phillips*, 245 F. Supp. 247; *Galanti vs. U. S.*, 244 F. Supp. 528; *C. & R. Investments vs. Koehler*, 199 F. Supp. 131;

Ruby vs. Meyer, 194 F. Supp. 594; *Bushmiaer vs. U. S.,* 146 F. Supp. 329; *Walker vs. Internal Revenue Service Department,* 333 F. 2nd 768; *Johnson vs. Wall,* 329 F. 2nd 149; *Mong vs. Smyph,* 229 F. 2nd 361; *McCann vs. U. S.,* 248 F. Supp. 585; *McClure vs. Roundtree,* 218 F. Supp. 215; *Mrizek vs. Long,* 187 F. Supp. 830; *Pettengill vs. U. S.,* 205 F. Supp. 10; and *Bell vs. Gray,* 191 F. Supp. 328.

The above authorities are merely a few of the many cases which have granted relief in the Federal Court notwithstanding the fact that the United States or its agency was involved and notwithstanding the fact that the issue might have involved taxes. These cases vary in their facts and in the application of principles thereto, and we submit the argument that the facts in the case at bar are similar to the facts in the other cases where the Courts have assumed jurisdiction. The Courts have stated that where special circumstances exist, of unusual character, then it may be considered appropriate for equitable remedies to be applied in the assumption of jurisdiction by the Federal Court.

The Appellants, being clearly not the taxpayers, are Third Persons who would not have any remedy in any court unless the Federal Court assumed jurisdiction in this case.

We believe that the authorities cited herein supply a solid foundation for the argument that the United States has given its consent to the type of case outlined by the Amended Complaint of the Appellants.

With reference to the Appellee, Irving Machiz, the District Director of Internal Revenue of Maryland, the Trial Court, recognized that he could be enjoined from enforcing an unconstitutional statute.

The Trial Court further recognized that equitable exceptions have been established by the Federal Courts in as-

suming jurisdiction as indicated in the case of *Enochs vs. Williams Packing and Navigation Co.*, 370 U. S. 1, 82 S. Ct. 1125 (1962).

CONCLUSION

It is respectfully submitted that the record in this case establishes that the Petitioners should be provided with a forum for a determination of the issues raised in this proceeding, and a Writ of Certiorari should be issued in this case.

Respectfully submitted,

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